**IN THE SUPREME COURT**
**FOR THE STATE OF MICHIGAN**

MELISSA MAYS, et al.,
Plaintiff-Appellees,

v

DARNELL EARLEY and GERALD AMBROSE,
Defendant-Appellants,

and

GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and MICHGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES
Defendants.
_____/

Supreme Court No. _____

Court of Appeals Nos. 335555, 335725, 335726

Court of Claims No. 16-17-MM

# APPLICATION FOR LEAVE TO APPEAL BY FORMER EMERGENCY MANAGERS DARNELL EARLEY AND GERALD AMBROSE

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## STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to MCR §7.303(B)(1), as Defendant-Appellants Darnell Earley and Gerald Ambrose, former Emergency Managers for the City of Flint, seek leave to appeal three issues addressed by the January 25, 2018 decision of the Michigan Court of Appeals, affirming the Michigan Court of Claims October 26, 2016 decision. In that decision, the Court of Appeals erred by affirming a Court of Claims decision that (1) failed to strictly enforce MCL §600.6431's notice requirement, (2) recognized a substantive due process claim under the Michigan Constitution that was not warranted, and (3) recognized an inverse condemnation claim that was also not warranted. The former Emergency Managers respectfully request that this Court grant its application or, in the alternative, reverse the decision of the Court of Appeals as to those issues.

## STATEMENT OF QUESTIONS PRESENTED

1) MCL §600.6431(3) requires that a plaintiff is barred from suit unless sit gives proper notice within 6 months of "the happening of the event giving rise to the cause of action." Should this court excuse compliance with the statutory notice requirement if the cause of action accrued more than 6 months before notice, but not every form of damage was fully manifested until a later date?

   Defendant-Appellant's answer: No.

   Plaintiff-Appellee's answer: Yes.

   Trial Court's answer: Yes.

   Appellate Court's answer: Yes.

2) Is there a "harsh and unreasonable consequences" exception to MCL §600.6431's notice requirement and does it apply to this case?

   Defendant-Appellant's answer: No.

   Plaintiff-Appellee's answer: Yes.

   Trial Court's answer: Yes.

   Appellate Court's answer: Yes.

3) Is there a "fraudulent concealment" exception to MCL §600.6431's notice requirement and does it apply to this case?

   Defendant-Appellant's answer: No.

   Plaintiff-Appellee's answer: Yes.

   Trial Court's answer: No.

   Appellate Court's answer: Yes.

4) Does this case implicate the substantive due process right to bodily integrity under the Michigan Constitution?

   Defendant-Appellant's answer: No.

   Plaintiff-Appellee's answer: Yes.

   Trial Court's answer: Yes.

   Appellate Court's answer: Yes.

5) Is this case one in which a damages remedy for a constitutional tort claim appropriate?

   Defendant-Appellant's answer: No.

   Plaintiff-Appellee's answer: Yes.

   Trial Court's answer: Yes.

   Appellate Court's answer: Yes.

6) Is an inverse condemnation claim warranted where there is there was no affirmative actions aimed directly at property nor were there unique injuries, different in kind, from the harms suffered by persons similarly situated?

   Defendant-Appellant's answer: No.

   Plaintiff-Appellee's answer: Yes.

   Trial Court's answer: Yes.

   Appellate Court's answer: Yes.

## STATUTES INVOLVED

**600.5827 Accrual of claim.**

Sec. 5827.

Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

**600.5855 Fraudulent concealment of claim or identity of person liable; discovery.**

Sec. 5855.

If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

**600.6431 Court of claims; notice of intention to file claim; contents; time; verification; copies.**

Sec. 6431.

(1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

(2) Such claim or notice shall designate any department, commission, board, institution, arm or agency of the state involved in connection with such claim, and a copy of such claim or notice shall be furnished to the clerk at the time of the filing of the original for transmittal to the attorney general and to each of the departments, commissions, boards, institutions, arms or agencies designated.

(3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

**600.6452 Court of claims; filing of claim; time; limitation of actions; right of attorney general to petition for administration of estate or appoint guardian of minor or disabled.**

Sec. 6452.

(1) Every claim against the state, cognizable by the court of claims, shall be forever barred unless the claim is filed with the clerk of the court or suit instituted thereon in federal court as authorized in section 6440, within 3 years after the claim first accrues.

(2) Except as modified by this section, the provisions of RJA chapter 58, relative to the limitation of actions, shall also be applicable to the limitation prescribed in this section.

(3) The attorney general shall have the same right as a creditor under the provisions of the statutes of the state of Michigan in such case made and provided, to petition for the granting of letters of administration of the estate of any deceased person.

(4) The attorney general shall have the same right as a superintendent of the poor under the provisions of the statutes of the state of Michigan in such case made and provided, to petition for the appointment of a guardian of the estate of a minor or any other person under disability.

## I. INTRODUCTION

This is an Application for Leave to Appeal by former Flint Emergency Managers Darnell Earley and Gerald Ambrose, arising out of the Flint Water Crisis and raising six (6) issues for review. Three of those issues relate to the jurisdictional notice requirement of the Court of Claims Act, which conditions the ability to bring suit in the Court of Claims, for injury to persons or property, on the Plaintiff having either brought the claim itself or provided adequate notice of the claim within six months of the event giving rise to the cause of action. MCL §600.6431(3). Unfortunately, the Court of Appeals ignored this Court's directive that such requirements are to be strictly construed and instead allowed Plaintiffs to circumvent the plain language of that statute. In addition, the Court of Appeals also erred in three ways regarding Plaintiffs' substantive due process claim under the Michigan constitution and their inverse condemnation claim.

Specifically, the Court of Appeals first erred when it affirmed the decision of the Court of Claims by holding that Plaintiffs were excused from strictly complying with MCL §600.6431's notice requirement because some of the damages were potentially not fully manifested until the six month period prior to the filing of this suit. The Court of Appeals next erred by applying the "harsh and unreasonable consequences" doctrine, an outdated judicially-created exception that has been abrogated by this Court's controlling case law, to excuse Plaintiffs' noncompliance with MCL §600.6431's notice requirement. The Court of Appeals erred again when it held that fraudulent concealment tolling could apply to the Court of Claims Act's notice requirement, despite the plain statutory language applying such tolling only to the statute of limitations.

The Court of Appeals committed three more errors when it upheld Plaintiffs' substantive due process bodily integrity and inverse condemnation claims. First, the Court of Appeals erred by holding that a substantive due process bodily integrity claim under the Michigan constitution was implicated, solely on the basis of allegedly "conscience-shocking" behavior, and despite the

lack of any factually similar precedent involving either state or federal bodily integrity claims. Next, the Court of Appeals failed to adhere to this Court's guidance from *Jones v Powell*, 462 Mich 329 (2000) ), when it held that a damages remedy was appropriate despite the availability of other remedies, the existence of a legislative scheme addressing the provision of safe drinking water, and "other factors militating against a damages remedy." (identified as relevant by Justice Boyle in *Smith v Department of Public Health*, 428 Mich 540 (1987). Finally, the Court of Appeals erred by allowing an inverse condemnation claim to survive where no affirmative acts were directly aimed at the plaintiffs' property nor were there unique injuries, different in kind from others similarly situated.

On any or all of these grounds, former Emergency Managers Earley and Ambrose respectfully request that this Court grant leave to appeal, or, in the alternative, summarily reverse the Court of Appeals on those issues, because:

1) The issues in this case have significant public interest, and Plaintiffs seek relief from state officers named in their official capacity, who are statutorily entitled to indemnification from a financially-distressed municipality, a subdivision of this state. In addition to affecting former Emergency Managers Earley and Ambrose, this case potentially affects all government entities, and the officials and employees of those entities, who provide the public access to drinking water in the State of Michigan. The issues involved also have significant implications for any claims of damage to persons or property brought in the Michigan Court of Claims, and all Michigan citizens whose tax dollars fund those entities. MCR §7.305(B)(2).
2) This case also involves legal principles of major significance to the state's jurisprudence, because it addresses: (1) the standards for compliance with statutory notice requirements, an issue that this Court previously addressed in *Trentatdue v*

*Buckler Lawn Sprinkler*, 479 Mich 378 (2007); (2) when damages properly accrue as the result of environmental harms, an issue addressed by this Court in *Trentatdue*, and which recently resulted in summary reversal of the Court of Appeals in *Henry v Dow Chemical*, 905 NW2d 601 (Mich. 2018); (3) the correct analysis for determining whether a damages remedy for a constitutional tort under the Michigan constitution is appropriate, an issue that this Court addressed in *Jones v Powell*, 462 Mich 329 and *Smith v Department of Public Health*, 428 Mich 540; (3) the elements of an invasion of bodily integrity claim under the Michigan constitution, an issue of first impression; and (4) the elements of a "public nuisance" inverse condemnation claim, an issue this Court addressed in *Spiek v Department of Transportation*, 456 Mich 331 (1998). MCR §7.305(B)(3).

3) The Court of Appeals' decision conflicts with the directives from this Court, as cited above. The Court of Appeals decision also conflicts with this Court's repeated direction that exceptions to governmental immunity be narrowly construed, that governmental tort notice requirements be strictly construed, and this Court's general approach to evaluating the scope and enforceability of governmental tort notices. MCR §7.305(B)(5)(b).

## II. STATEMENT OF FACTS AND PROCEEDINGS

This is a civil case arising out of the Flint Water Crisis, and as required at this stage of the proceedings, Plaintiffs' well-pled factual allegations are accepted as true and reasonable inferences are drawn in favor of the Plaintiffs. *See, e.g.*, *Johnson v Pastoriza*, 491 Mich 417, 434-35 (2012). Defendant-Appellants Darnell Earley ("Earley") and Gerald Ambrose ("Ambrose") were appointed by Governor Snyder to serve as Emergency Managers for the City of Flint pursuant to the "Financial Stability and Choice Act," commonly referred to as PA 436. *See* 2012 PA 436

(*codified at* MCL §141.1541 *et seq*.) Earley served as Emergency Manager from September 2013 through January 2015, and Ambrose served as Emergency Manager from January 2015 through April 2015. *See, e.g.*, Am. Compl., ¶¶56, 70. As Emergency Managers, they were granted broad authority and sweeping powers to "rectify the financial emergency and to assure the financial accountability of the local government and the local government's capacity to provide or cause to provided necessary governmental services essential to the public health, safety, and welfare." MCL §141.1549(2).

In April 2013, Governor Snyder authorized then-Flint Emergency Manager Ed Kurtz to contract with the newly-formed Karegnondi Water Authority (KWA) to supply the City with water beginning in mid-2016. *See* Am. Compl., ¶49. When the contract was executed, state officials allegedly knew that the Flint River would be used as an interim water source and that previous studies had cautioned against its use. *See* Am. Compl., ¶50-54.

A year later, on April 25, 2014 under the direction of Earley and the Michigan Department of Environmental Quality ("MDEQ"), Flint switched from DWSD to the Flint River, nine (9) days after the water quality supervisor advised MDEQ that the water plant was not ready to begin operations. *See* Am. Compl., ¶57. State officials began receiving complaints regarding the water within a month. By June 2014, Flint residents complained that the water was making them ill. *See* Am. Compl., ¶62. In October, General Motors discontinued the use of Flint water at its Flint plant, and Flint officials became aware of the threat of Legionnaires disease. *See* Am. Compl., ¶66-67.

In January 2015, Earley resigned as Emergency Manager and was replaced by Ambrose. *See* Am. Compl., ¶70. In February, the United States Environmental Protection Agency advised MDEQ that the Flint water supply was contaminated with iron and, potentially, lead. *See* Am. Compl., ¶¶80-81. In April 2015, Ambrose resigned as Emergency Manager. On February 17, 2015, Flint water users staged public demonstrations protesting against the use of Flint River water. *See*

Am. Compl., ¶79. By March 2015, the Flint City Council voted to cease using Flint River water. *See* Am. Compl., ¶86.

Through the remainder of 2015, other state officials allegedly continued to cover up the health emergency, discredit reports, and advise the public that the water was safe. *See, e.g.*, Am. Compl., ¶¶82 (MDEQ official Steven Busch); ¶83 (Governor Snyder and unnamed "officials"); ¶89 (MDEQ officials Liane Shekter-Smith, Patrick Cook, Stephen Busch, and Michael Prysby); ¶¶93, 96, 98, 105-106 (MDEQ official Brad Wurfel); ¶¶99-100 (MDHHS Director Nick Lyon). On October 8, 2015, the Governor changed course and ordered Flint to reconnect to Detroit. *See* Am. Compl., ¶109.

Plaintiff-Appellees filed this action on January 21, 2016; no notice of claim was filed with the clerk of the Court of Claims. On April 4, 2016, Governor Snyder, the State of Michigan, MDEQ, and the Michigan Department of Health and Human Services (MDHHS) filed a motion for summary disposition, and on April 18, 2016, the former Emergency Managers filed their own motion for summary disposition. On May 25, 2016, Plaintiff-Appellees filed an Amended Complaint.

The Amended Complaint alleged four counts: (Count I) violation of substantive due process – state created danger under the Michigan Constitution; (Count II) violation of substantive due process – bodily integrity under the Michigan Constitution; (Count III) denial of fair and just treatment in investigation under the Michigan Constitution; and (Count IV) unconstitutional taking or property. (Am. Compl. at 26-31.) On June 24, 2016, all defendants filed motions for summary disposition as to Plaintiff-Appellees' Amended Complaint. The motions for summary disposition were fully briefed, and on October 26, 2016, the Court of Claims entered an Opinion and Order granting summary disposition under MCR 2.116(C)(8) as to Counts I and III, and denying

summary disposition under MCR 2.116(C)(8) as to Counts II and IV The Court also denied summary disposition under MCR 2.116(C)(7).

All parties appealed some aspects of the October 26 Opinion and Order. The parties subsequently briefed the issues raised, which included all aspects of the trial court's order except the dismissal of Count III, which plaintiffs failed to raise.[1] Oral argument was held on January 9, 2018, and on January 25, 2018, in a decision noted for publication, the Court of Appeals affirmed the Court of Claims. Earley and Ambrose now file this Application for Leave to Appeal.

## III. ANALYSIS

### A. STANDARD OF REVIEW

A trial court's denial of summary disposition is reviewed *de novo*. *Rowland v Washtenaw Co Rd Comm'n*, 477 Mich 197, 202 (2007) ). Questions of statutory interpretation are also reviewed *de novo*. *Rowland*, 477 Mich at 202. The primary goal in statutory interpretation is to give effect to the intent of the Legislature. *Id.* When the language is unambiguous, words are given their plain meaning and the statute is applied as written. *Id.* Statutory interpretation must give effect "to every phrase, clause, and word in the statute, and no word should be treated as surplusage or rendered nugatory." *Gardner v Dep't of Treasury*, 498 Mich 1, 6 (2015).

### B. THE COURT OF APPEALS ERRED BY FAILING TO ENFORCE MCL 600.6431'S NOTICE REQUIREMENT AS WRITTEN

The Court of Appeals gave three reasons why Plaintiffs claims were not barred by that 6 month jurisdictional notice requirement. First, it held that the six month period ran from date of each "distinct harm," i.e.., element of damage, was suffered, and that a question of fact existed as

[1] The City of Flint moved to intervene and consolidate the appeal with another pending appeal in *Boler v Governor Snyder*, Court of Appeals No. 337383, another case arising out of the Flint Water Crisis that raised an issue that related to one of the issues in this case. On April 4, 2017, the Court of Appeals denied intervention and consolidation.

to whether the last of the damages were suffered within 6 months of suit. Opinion, at 8. Second, it held that compliance was excused because application of the jurisdictional requirement would be "harsh and unreasonable". *Id.* at 10-14. Third, it held that the notice period was tolled under Michigan's fraudulent concealment statute. *Id.* at 14-17. All of the reasons given by the Court of Appeals disregard the plain language of MCL §600.6431 and are precluded by controlling decisions of this Court.

**1. The Court of Appeals erred as a matter of law in holding that the notice period did not begin to run until Plaintiffs suffered each element of damages**

The Court of Appeals acknowledged that a person claiming property damage or personal injuries must file their claim or a notice of claim "within 6 months following the happening of the event giving rise to the cause of action." MCL §600.6431(3). The Court of Appeals also acknowledged that "no judicially created savings construction is permitted to avoid a clear statutory mandate" and that "[c]ourts may not engraft an actual prejudice requirement or otherwise reduce the obligation to comply fully with the statutory notice requirements." *McCahan v Brennan*, 492 Mich 730, 733, 747 (2012). Despite those acknowledgments, the Court of Appeals judicially created an exception to a statutory notice requirement that reduces the obligation to comply with that requirement.

To do this, the Court of Appeals erroneously held that denial of summary disposition was appropriate because it was not certain that each type of Plaintiffs' claimed damages were fully manifiested more than six months from the date the suit was filed. Specifically, the Court of Appeals ruled that the notice requirement in MCL §600.6431 was satisfied because Plaintiffs alleged damages, such as "economic damages in the form of lost property value" that the Court of Appeals determined would not have accrued until the Flint Water Crisis became public in October 2015. *See* Opinion, at 9. The Court of Appeals also ruled that "it [was] not clear on what date Plaintiffs suffered actionable personal injuries." *Id.* These rulings were in error.

The Court of Appeals decision here relied upon *Henry v Dow Chemical*, 319 Mich App 704 (2017), *see* Opinion, at 9, but *Henry* was reversed by this Court earlier this year. *See Henry v Dow Chem. Co.*, 905 NW2d 601 (2018). This Court adopted the Judge Gadola's dissent in *Henry*, so a comparison of that dissent and majority opinion illustrates the Court of Appeals' error here. In *Henry*, downstream property owners claimed that they "suffered loss of the free use and enjoyment of their property as well as damages in the form of decreased property value, as a result of dioxin contamination discovered in the flood plain soil." *Henry*, 319 Mich App at 709. One issue addressed was whether the plaintiffs' claims were barred by the statute of limitations.

The Court of Appeals in *Henry* rejected the defendants' argument that the plaintiffs' claims had accrued when the public was first made aware of the presence of dioxins in 1984, and instead determined that plaintiffs' claims did not accrue until a 2002 report was published by MDEQ, at which time property values were noticeably affected. *Id.* at 715-32. Specifically, the Court of Appeals noted that:

> Plaintiffs' damages, including loss of the use and enjoyment of their property and depreciation of their property values, arose from the harm created when dioxins in their soil reached potentially toxic levels, but the damages did not exist in any tangible form until the MDEQ published its 2002 notice. As the circuit court aptly noted, "[p]rior to this time, Plaintiffs were free to use and enjoy their property without worry or restriction, and to sell their property without loss of value."

*Id.*

Judge Gadola's dissent in *Henry* rejected the majority's separation of "harm" and "damages" into discrete elements, and instead noted that "the publication of the MDEQ bulletin is not the "wrong" on which the claim is based . . . The MDEQ bulletin, at most, marks the discovery by plaintiffs of the extent of the harm and the level of damages." *Id.* at 735-36 (Gadola, J., dissenting). Both this Court and Judge Gadola's dissent relied on *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 387 (2007). In that case, this Court had explained that the

statute of limitations period "begins to run from 'the time the claim accrues,' and 'the claim accrues ***at the time the wrong upon which the claim is based was done*** regardless of the time when damage results." *Henry*, 905 NW2d at 601 (*citing Trentadue*, 479 Mich at 387) (emphasis added).

In other words, this Court has clarified that a claim accrues upon the occurrence of the wrong, not upon manifestation of "damages", even if the full scope of the damages resulting from that harm are not evident. This distinction is congruent with this Court's rejection of judicially-created savings constructions. *See, e.g.*, *McCahan*, 492 Mich at 747 (rejecting an actual prejudice exception that was not supported by the statutory text); *Trentadue*, 479 Mich at 392-93 (rejecting the common-law discovery rule); *Garg v Macomb Co Comm Mental Health Svcs*, 472 Mich 263, 282 (2005) (rejecting the common-law continuing violations doctrine).

Here, the Court of Appeals repeated its error from *Henry*, and artificially distinguished the *harm* suffered – alleged exposure to contaminated water – with the damages resulting from that harm – such as lost property value. The Court of Appeals failed to give effect to the plain language of MCL §600.6431(3), which unambiguously requires that claimants file their claim or notice of claim "within 6 months following the happening of the event giving rise to the cause of action." MCL §600.6431(3). The Court of Appeals also failed to give effect to the provisions of MCL §600.5827, which provides that "[t]he claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done ***regardless of the time when damage results***." MCL §600.5827 (emphasis added).

Instead, the Court of Appeals should have reviewed the allegations in Plaintiffs' complaint to determine, based on those allegations, what harm Plaintiffs had allegedly suffered and when that harm had occurred. Had it done so, the Court would have found that Plaintiffs alleged harms

occurred well over six months prior to the filing of this case in the Court of Claims. For example, Plaintiffs alleged that:

- "Beginning in June 2013 and continuing through April 25, 2014, the State created a dangerous public health crisis for the users of Flint tap water when it and Kurtz and Earley ordered and set in motion the use of highly corrosive and toxic Flint River water knowing that the WTP was not ready." Am. Compl., at ¶59.
- "In June 2014, citizen complaints about contaminated water continued without the State doing anything to address these complaints. Many Flint water users reported that the water was making them ill." *Id.*, at ¶62.
- "On October 13, 2014, the General Motors Corporation announced that it would no longer use Flint River water in its Flint plant. Despite this clear evidence of serious and significant danger, none of the Defendants took any action to alter the course of the health crisis." *Id.*, at ¶66.
- "In January 2015, Flint home owner, LeeAnn Walters, called the EPA regarding water issues that she was experiencing at her Flint home. She informed the EPA that she and her family members were becoming physically ill from exposure to the Flint River water coming from her tap." *Id.*, at ¶75.
- In March 25, 2015, the Flint City Council voted to stop using the Flint River water. *Id.* at ¶ 86.

These allegations, among others, show how the Plaintiffs, or persons similarly situated, suffered harms to their persons and to their property and thus how their claims had accrued more than six months prior to the filing of their Complaint.

Indeed, one of the named Plaintiffs, Melissa Mays, was a plaintiff in another case, captioned *Coalition for Clean Water v City of Flint*, Genesee County Circuit Court Case No. 15-

10190, filed on June 5, 2015, more than six months prior to the date the instant case was filed[2]. *See* **Exhibit A: Complaint, Coalition for Clean Water v City of Flint**; *see also* **Exhibit B: Am. Compl., Coalition for Clean Water v City of Flint**. That case arose out of the same factual situation as this case: the use, by the City of Flint, of the Flint River as a municipal water source. And in that case, the *Coalition* plaintiffs alleged that they "have suffered severe health problems that have been directly connected to the unhealthy, contaminated River water." Ex. A, at 7-8. *Coalition for Clean Water* thus provides additional examples of how the harms alleged here both existed and were evident over six months prior to the filing of this case.

Here, Plaintiffs have not complied with the MCL §600.6431(3) notice requirement, because they failed to file either their claim or a notice of claim within 6 months of the accrual of their claim. The lower courts erred by failing to strictly enforce this notice requirement and erroneously applying a judicially created exception that this Court has previously rejected. Leave to appeal or reversal of the lower court on this issue is thus warranted.

**2. No "harsh and unreasonable consequences" exception to the statutory notice requirements exists and, even if there were, it is irrelevant to this case**

The Court of Appeals also erred by holding that the "harsh and unreasonable consequences" doctrine (1) exists and (2) applies. The Court of Appeals relied on dictum in *Rusha v Department of Corrections*, a 2014 case, to the effect that a limitations period may be excused if "'it can be demonstrated that [statutes of limitation] are so harsh and unreasonable in their consequences that they effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right.'" *Rusha v Dep't of Corr.*, 307 Mich App 300, 310 (2014). *Rusha* relied on

[2] Courts may take judicial notice of actions filed in court. *See* People v Sinclair, 387 Mich 91, 103 (1972).

a 1983 case from the Michigan Court of Appeals, *Curtin v Department of State Highways*, 127 Mich App 160, 163 (1983). The central holding in *Curtin* was supported by reference to *Reich v State Highway Department*, a 1972 case holding that a 60-day statute of limitations was arbitrary and violated equal protection principles.

However, as even the Court of Appeals acknowledged, (*see* Opinion, at 11 n 8) *Reich*, and by extension, *Curtin*, was abrogated by this Court in *Rowland v Washtenaw County Road Commission*, 477 Mich 197, 206-07 (2007). The validity of *Rusha's* "harsh and unreasonable consequences doctrine" is thus seriously in doubt. The Court of Appeals attempted to minimize this shortcoming, but did so without citing to a single controlling case from this court that would allow for such judicially-created exception to an express legislative directive.

The Court of Appeals also noted that this Court had denied leave to appeal in that case. *See* Opinion, at 12 n 8 (*citing Rusha v Dep't of Corrections*, 498 Mich 860 (2015)). However, in *Rusha*; the Court of Appeals held that Plaintiff was not entitled to an exception; the notion that denial of leave there somehow supported the existence of an exception makes no logical sense. *See* Opinion, at 12 ("in *Rusha*, the Court concluded that there was no reason to relieve the plaintiff from the requirement of strict compliance") (*citing Rusha*, 307 Mich App at 312-13).

Where review of *Rusha* by this Court was unnecessary, given that the Court of Appeals there did not apply the "harsh and unreasonable consequences" doctrine, here, in contrast, the Court of Appeals has done so and correction by this Court is needed.[3] The judicially created "harsh and unreasonable consequences" doctrine is in direct conflict with this Court's direction that statutes of limitations and notice requirements are to be strictly enforced, as set forth by the

[3] Despite the contradiction between *Rusha* and controlling decisions by this Court, the Court of Appeals expressly declined to convene a conflict panel pursuant to MCR §7.215(J). Opinion, at 11 n 7.

Legislature. *See, e.g.*, *McCahan*, 492 Mich at 746-47 ("Courts may not . . . otherwise reduce the obligation to comply fully with statutory notice requirements. Filing notice outside the statutorily required notice period does not constitute compliance with the statute."); *Trentadue*, 479 Mich at 391 ("we conclude that courts may not employ an extrastatutory discovery rule to toll accrual"); *Rowland*, 477 Mich at 219 ("The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written.")

Finally, the fact that, as noted above, plaintiff Mays filed a lawsuit more than 6 months earlier than the present lawsuit makes it clear that, even if the "harsh and unreasonable consequences" doctrine still exists, here the 6 month notice requirement did not effectively divest plaintiffs of the access to the courts.

In the present case, the Court of Appeals relied on its erroneous dictum in *Rusha*, as an alternative legal basis on which to excuse Plaintiffs from strict compliance with the notice requirements of MCL §600.6431(3). Correction of the lower courts' error is needed to clarify and resolve the conflict between the *Rusha* and the decisions of this Court. Leave to appeal or reversal of the lower court here is thus warranted.

### 3. Applying fraudulent concealment tolling to MCL §600.6431's notice provision was an impermissible judicially-created exception to the statutory language

Here, the Court of Appeals went even farther than did the Court of Claims by holding the fraudulent concealment tolling exception to the statute of limitations, contained in MCL §600.5855, applied to the notice requirement of MCL §600.6431. This error by the Court of Appeals represents both an incorrect interpretation of the statutory text, as well as a failure to recognize or respect the different purposes of statutes of limitations and pre-suit notice requirements. Review by this court and reversal of the Court of Appeals is needed to correct these errors.

Applying MCL §600.5855 to notice provisions honors neither the plain language of the statute nor the purpose of notice provision. This Court has instructed that "[s]tatutes of limitations are intended to 'compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend'; 'to relieve a court system from dealing with 'stale' claims, where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured'; and to protect 'potential defendants from protracted fear of litigation'. *Bigelow v Walraven*, 392 Mich 566, 576 (1974). All those reasons apply only to litigation, and two of those rationales are intended to protect defendants. Applying the fraudulent concealment tolling provisions to a statute of limitations thus prevents a defendant who fraudulently conceals such claims from benefitting in litigation from his or her fraudulent acts.

In contrast, this Court has found that statutory notice requirements serve distinctly different purposes. For example, in analyzing the even more restrictive notice requirement under MCL §691.1404, the Supreme Court identified that such notice provisions afford a governmental agency time to (1) investigate a claim when the information is freshest, (2) determine possible liability, (3) create adequate reserves, (4) reduce uncertainty of the extent of future demands, and (5) force a claimant to make an early choice on how to proceed. *Rowland v Washtenaw Co Rd Comm'n*, 477 Mich 197, 212 (2007). The purposes of such notice requirements thus extend beyond the four corners of litigation and implicate public policy considerations, such as allocating public funds, strategic planning, and encouraging corrective actions.

In addition, the Legislature's included in the Court of Claims Act a specific reference to the fraudulent concealment exception to statute of limitations. *See, e.g.*, MCL §600.6452 ("Except as modified by this section, the provisions of RJA chapter 58, relative to the limitation of actions, shall also be applicable to the limitation prescribed in this section"); MCL §600.5855 (creating a statutory fraudulent concealment exception to statutes of limitations as part of Chapter 58 of the

RJA). The explicit inclusion of fraudulent concealment tolling, for statutes of limitation, implies that the absence of any similar reference in relation to the statutory notice provision, MCL §600.6431, was both intentional and deliberate. As this Court held:

> "Generally, when language is included in one section of a statute but omitted from another section, it is presumed that the drafters acted intentionally and purposely in their inclusion or exclusion." *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). The courts may not read into the statute a requirement that the Legislature has seen fit to omit. *In re Hurd-Marvin Drain*, 331 Mich 504, 509; 50 NW2d 143 (1951); *Mich Basic Prop Ins Ass'n v Office of Fin & Ins Regulation*, 288 Mich App 552, 560; 808 NW2d 456 (2010). "When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose." *Mich Basic Prop Ins Ass'n*, 288 Mich App at 560 (quotation marks and citation omitted).

*Menard Inc v Dep't of Treasury*, 302 Mich App 467, 471-72 (2013). In other words, the lower courts should treat the absence of a fraudulent concealment tolling provision in the notice provisions of the Court of Claims Act as an intentional act by the Legislature. Instead of respecting this clearly-expressed legislative policy decision, the Court of Appeals impermissibly substituted its judgment for that of the Legislature.

There is no legal basis for equating notice requirements and statutes of limitations under the Court of Claims Act, as the Court of Appeals has recognized in other decisions. *See Zelek v State*, No. 305191, 2012 Mich App LEXIS 1993, at *4 (Ct. App. Oct 16, 2012) ("The Court of Claims notice provision has no effect on the limitation period and is not subject to the tolling provisions of MCL 600.5855"); *Brewer v Cent. Mich. Univ Bd. of Trs.*, No. 312374, 2013 Mich App LEXIS 1923, at *4 (Ct. App. Nov 21, 2013) ("plaintiff's arguments are premised on exceptions to the statute of limitations . . . [y]et, the notice requirement of MCL 600.6431(3) is not a statute of limitations, a savings provision, or a tolling provision."). The Court of Appeals decision here is an error. Leave to appeal or reversal of the lower courts on this issue is thus warranted.

## C. THE COURT OF APPEALS ERRED BY RECOGNIZING A BODILY INTEGRITY CLAIM UNDER THE MICHIGAN CONSTITUTION UNDER THE CIRCUMSTANCES ALLEGED HERE

**STANDARD OF REVIEW**: This court reviews the court of appeals' denial of the Defendant-Appellants' motion for summary disposition regarding this issue *de novo*. *Rowland*, 477 Mich at 202.

The Court of Appeals holding, that Plaintiffs had stated a claim for violation of a substantive due process invasion of bodily integrity claim under the Michigan constitution, erred in two ways. First, the constitutional right to bodily integrity right is not implicated on these facts. Second, under Michigan law, constitutional torts may only be pursued "on the basis of the unavailability of any other remedy." *Jones v Powell*, 462 Mich 329, 337 (2000).

### 1. The Plaintiffs have failed to allege a violation of the substantive due process right to bodily integrity under the Michigan constitution

In examining whether Plaintiffs had alleged a substantive due process bodily integrity claim, the Court of Appeals focused its analysis on whether the state actors, collectively, "shocked the conscience" in a constitutional sense. *Id at* *18. This was incorrect in two ways. First, the Court of Appeals ignored the threshold issue of whether the alleged conscience shocking behavior violated the right to bodily integrity. Allegations of "conscience shocking" behavior, untethered from a concrete substantive due process right, does not state a claim. See *County of Sacramento v Lewis*, 523 US 833, 847, n 8, 118 SCt 1708, 140 LEd2d 1043 (1998) (plaintiffs must show, both action that shocks the conscience and violation of a right otherwise protected by the substantive Due Process Clause). Second, the lower courts also failed to analyze whether the actions of each of the former officeholders of Emergency Manager for the City of Flint, individually, as opposed to all defendants collectively, constituted conscience shocking behavior. Properly analyzed,

Plaintiffs both (1) failed to allege conscience shocking behavior that violated the bodily integrity right, and (2) failed to allege how the Emergency Managers had done so.

a. ***Plaintiffs do not allege a violation of the right to bodily integrity***

Article I, §17 of the Michigan Constitution states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Const Art I, §17. However, Michigan courts have never recognized a private action for violation of right to bodily integrity under the state Constitution, or defined the parameters of such a claim. Nonetheless, the due process provisions of the Michigan Constitution are interpreted in a fashion that mirrors that of the federal Constitution. *People v Sierb*, 456 Mich 519, 523, 529 (1998). Thus, assuming that a bodily integrity claim under the state Constitution exists, it should mirror the parallel claim under the federal Constitution.

By examining the cases in which the U.S. Supreme Court has recognized a right to bodily integrity, it is apparent the right has only been found in connection with a direct or intimate physical invasions targeted directly at a specific person.[4] Each such case involve a specific government actor, carrying out direct physical invasions targeted at a specific person with intended

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[4] *Washington v Harper*, 494 US 210, 229 (1990), involving "forcible injection of medication;" *Cruzan v Dir Mo Dep't of Health*, 497 US 261, 278 (1990), involving "unwanted medical treatment;" *Skinner v Oklahoma*, 316 US 535, 541 (1942), involving "forced sterilization;" and *Winston v Lee*, 470 US 753, 766-67 (1985), involving "surgical intrusion into a suspect's chest.

*See also, Planned Parenthood Southwest Ohio Region v Dewine*, 696 F3d 490, 506-07 (6th Cir 2012) (finding the right to bodily integrity implicated by intentionally interfering with the right to abortion); *United States v Booker*, 728 F3d 535, 546 (6th Cir 2004) (disallowing rectal searches without warrant as a violation of the right to bodily integrity); *Doe v Claiborne County*, 103 F3d 495, 507 (6th Cir 1996) (sexual abuse of child by public school employee violated right to bodily integrity); *Wilson v Beebe*, 770 F2d 578, 598 (6th Cir 1985) (substantive right to bodily integrity violated by officer shooting non-resisting arrestee).

outcomes and invading, in the ordinary meaning of that term,[5] a person's body. No such allegations are made here.

Conversely, the right has not been applied to non-targeted conduct which, through a complex series of intervening contingencies, ultimately harms some members of a broad population, nor does it involve environmental harms.[6] Were the law otherwise, every governmental tort which ultimately results in bodily harm to a member (or members) of the public would potentially be a constitutional tort.

This difference is recognized in a consistent body of case law rejecting a claimed constitutional right to a healthful environment:

> [W]henever federal courts have faced assertions of fundamental rights to a "healthful environment" or to freedom from harmful contaminants, they have invariably rejected those claims. *See, e.g.*, *Ely v Velde*, 451 F2d 1130, 1139 (4th Cir 1971) (holding that there is no constitutional right to a healthful environment); *SF Chapter of A. Philip Randolph Inst. v US EPA*, No C 07-04936 CRB, 2008 U.S. Dist. LEXIS 27794 (ND Cal Mar 28, 2008) (rejecting asserted rights to be free from climate change pollution and to have a certain quality of life); *In re Agent Orange Prod. Liab. Litig.*, 475 F Supp 928, 934 (EDNY 1979) ("[T]here is not yet any constitutional right ... to be free of the allegedly toxic chemicals involved in this litigation."); *Pinkney v Ohio EPA*, 375 F Supp 305, 310 (ND Ohio 1974) ("[T]he Court is unable to rule that the right to a healthful environment is a fundamental right under the Constitution."); *Tanner v Armco Steel Corp.*, 340 F Supp 532, 537 (SD Tex 1972) ("[N]o legally enforceable right to a healthful environment, giving rise to an action for damages, is guaranteed by the Fourteenth Amendment or any other provision of the Federal Constitution."). In light of the foregoing, the Court concludes that the due process

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[5] See Webster's New World Dictionary, 2d Ed. "Invade: To enter forcibly or hostilely …" (primary definition).

[6] The former Emergency Managers recognize that a federal district court has upheld a bodily integrity claim in a case arising out of the Flint Water situation. *Guertin v Michigan*, No 16-cv-12412, 2017 US Dist. LEXIS 85544 (ED Mich June 5, 2017). That decision is presently on appeal to the federal Sixth Circuit Court of Appeals.

> clause does not guarantee a fundamental right to health or freedom from bodily harm.

*Lake v City of Southgate*, No. 16-10251, 2017 US Dist LEXIS 27623, (ED Mich Feb 28, 2017).

Indeed, in January of this year, a federal District Court held that the distribution of water with excessive lead levels does not give rise to a substantive due process bodily integrity claim. *See Branch v Christie*, Civil Action No 16-2467 (JMV) (MF), 2018 US Dist. LEXIS 3381 (DNJ. Jan 8, 2018). In that case, the court stated that:

> Plaintiffs cite to no cases that support their theory, as pled, of . . . [a] violation of bodily integrity. The Court also could not find any authority. To the contrary, substantive due process has been found not to guarantee a safe working environment or a right to minimum levels of safety. . . . At best, it is unclear whether Plaintiffs' alleged facts regarding lead in the drinking water would constitute a constitutional violation. In fact, there are several cases suggesting that they do not. However, the mere fact that the constitutional rights are unclear means that the Defendants are entitled to qualified immunity

Id. at *20.

The Court of Appeals' own citations bear this out. *See* Opinion, at 25. In defining the bodily integrity claim, the Court of Appeals cited to cases involving "abortion . . . end of life decisions . . . birth control decisions . . . corporal punishment . . . and instances where individuals are subject to dangerous or invasive procedures where their personal liberty is being restrained." *Id.* (internal citations omitted).

b. ***Plaintiffs have not alleged a violation by each of the Emergency Managers.***

Additionally, not only must there be an intentional violation of bodily integrity, but the violation must have been "inspired by malice or sadism rather than a merely careless or unwise excess of zeal." *Lilard v Shelby County Bd Of Educ*, 76 F3d 716, 725 (6th Cir 1996) (quoting *Webb v McCullough*, 828 F2d 1151, 1158 (6th Cir 1987)). The only exception to the "intentional intrusion inspired by malice or sadism" requirement is the "deliberate indifference standard,"

which can apply when actual deliberation is practical. *County of Sacramento v Lewis*, 523 US 833, 851 (1998). However, even when the deliberate indifference standard applies, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Mettler Walloon, LLC*, 281 Mich App at 198-99 (*quoting County of Sacramento v Lewis*, 523 US 833, 846 (1998)). In other words, "[t]he Due Process Clause is not a guarantee against incorrect or ill-advised [governmental] decisions." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 206 (2008), (*citing Collins v City of Harker Hts, Tex*, 503 US 115 (1992)) ("Although, in hindsight, we may agree that the decisions made were ill-advised, and may also agree that [the defendant] was negligent in failing to better inform himself before making the decision, this would not lead to the conclusion that he callously disregarded the risk of injury to the [plaintiffs]." *Ewolski v City of Brunswick*, 287 F3d 492, 515 (6th Cir 2002). If the law were otherwise, every government tort resulting in personal injury would be a constitutional claim. *See Paul v Davis*, 424 US 693, 701 (1976) (Otherwise, "the Fourteenth Amendment [would become] a font of tort law to be superimposed upon whatever systems may already be administered by the States.").

These standards must be applied to each individual defendant. Here, the Court of Appeals erred by failing to identify any specific action by either of the former Emergency Managers that constituted a conscience shocking violation of the constitutional right to bodily integrity, in which, after deliberation, each person deliberately disregarded likely personal harm to others. Instead, the lower courts looked only to the *collective* actions of various state officials and employees. As to the former Emergency Managers, Plaintiffs allege only the following:

- Former EMs Ambrose and Earley were appointed by Governor Snyder (Am. Compl., ¶¶27)
- Former EM Earley replaced EM Brown (Am. Compl., ¶56).

- On April 25, 2014, Flint water users began receiving Flint River Water "under the direction" of former EM Earley and officials from the MDEQ (Am. Compl., ¶58).
- Former EM Earley resigned in January 2015 and was replaced by Gerald Ambrose (Am. Compl., ¶70).
- Former EM Ambrose rejected an offer to purchase water from DWSD. (Am. Compl., ¶74).
- Former EM Ambrose refused to reconnect to DWSD on February 17, 2015 (Am. Compl., ¶79).
- Former EM Ambrose refused to reconnect to DWSD again on March 25, 2015. (Am. Compl., ¶86).

These allegations, even taken together, are insufficient to allege a violation of Plaintiffs constitutional bodily integrity right that "shocks the conscience."

No allegation establishes or implies that either Earley or Ambrose acted with malicious, sadistic intent. Neither do those allegations support a deliberate indifference claim, because the allegations fail to establish that the former Emergency Managers *knew* that their actions would have the tragic results that can be clearly seen in hindsight. Instead, the pertinent allegations of the complaint assert only that the former Emergency Managers were aware that negative consequences *might* result.

In essence, both the Court of Appeals and the Court of Claims erred by accepting Plaintiffs' conclusory allegations as facts. *See Kloian v Schwartz*, 272 Mich App 232, 240 (2006) ("Conclusory allegations are insufficient to state a cause of action"). At best, Plaintiffs allege facts implying that Earley and Ambrose made bad decisions that ultimately led to tragic results. Such alleged mistakes do not violate the due process clause of the Michigan Constitution. *See Mettler Walloon, LLC*, 281 Mich App at 206 (*citing Collins*, 503 US 115 (1992)). The Court of Appeals

thus erred when it held that the Plaintiffs here had alleged a violation of the substantive due process right to bodily integrity. While such a right exists, it is has not been specifically adopted by Michigan courts and is not implicated by the facts as alleged in this case. Leave to appeal or reversal of the lower court here is thus warranted

**2. The availability of other remedies and the inappropriateness of a damages remedy weighs against the judicial creation of a damages remedy here**

**STANDARD OF REVIEW**: Reviews of the Court of Appeals' denial of the Defendant-Appellants' motion for summary disposition on this issue is *de novo*. *Rowland*, 477 Mich at 202.

In addition, the Court of Appeals also erred by determining that a damages remedy was appropriate here at all. While this Court has acknowledged that constitutional torts under the Michigan constitution theoretically exist, it has never upheld as valid a constitutional tort claim under the Michigan constitution. Here, the Court of Appeals identified a five-factor test, citing to the Court of Claims decision, Justice Boyle's concurrence in part in *Smith v State*, 428 Mich 540, 637-52 (1987) (Boyle, J., concurring in part), this Court's decision in *Jones v Powell*, 462 Mich 329 (2000), and *Reid v Department of Corrections,* 239 Mich App 621 (2000). However, the five-factor test identified by the Court of Appeals is not actually set forth in the cases cited.

Instead, in *Smith,* Justice Boyle set forth a *three* part test to determine whether a damages remedy for constitutional torts under the Michigan constitution should be inferred. *Smith*, 428 Mich at 648-52. She identified the first step of this analysis as "establish[ing] the constitutional violation itself." *Id.* at 648. The second step "is to consider the text, history, and previous interpretations of the specific provision for guidance on the propriety of a judicially inferred damage remedy. *Id.* at 650. Finally, Justice Boyle noted that "various other factors, dependent upon the specific facts and circumstances of a given case, may militate against a judicially inferred damage remedy for violation of a specific constitutional provision." *Id.* at 651. In addition to

Justice Boyle's three-part test, this Court has also held that constitutional torts are only available as "a narrow remedy against the state on the basis of the unavailability of any other remedy." *Jones*, 462 Mich at 337. Under either Justice Boyle's three-part test or *Jones* unavailability standard, the Court of Appeals erred.

a. ***Other remedies are not unavailable to the Plaintiffs in this case and a damages remedy is therefore inappropriate***

Addressing *Jones'* "unavailability standard" first, the Plaintiffs in this case have other available remedies upon which the lower courts failed to place appropriate weight. Multiple other lawsuits, arising out of these same facts and circumstances, are pending in multiple other courts. Many of those other suits name former Emergency Managers Earley and Ambrose in their *official* capacities, as they are named here. These cases include ones that were filed by the Plaintiffs themselves.

In essence, the Court of Appeals erred by conflating the availability (or unavailability) of other remedies generally, with the availability (or unavailability) of specific *forms of relief*. For example, the Court of Appeals focused on the unavailability of monetary damages under 42 USC §1983 against the former emergency managers in their official capacities, as well as their immunity from tort liability under state law. *See* Opinion, at 29. However, that *monetary damages* are unavailable does not mean that *remedies* are unavailable. And it is apparent on the face of *Jones* that the question is whether *a* remedy is available, not whether a *damage* remedy is available. Thus, the *Jones* Court explained that "there are circumstances in which a constitutional right can only be vindicated by a damage remedy and where the right itself calls out for such a remedy. On the other hand, there are circumstances in which a damage remedy would not be appropriate. . . . Where a statute provides a remedy, the stark picture of a constitutional provision violated without remedy is not presented." Jones, 462 Mich at 336, quoting Justice Boyle's opinion in *Smith*, 428 Mich at 647.

Here, remedies are available under federal and Michigan Safe Drinking Water Acts, which are clearly implicated on the face of Plaintiffs' Complaint. Their claims, although couched here in constitutional terms, are intrinsically and inextricably entwined with alleged exposure to unsafe drinking water. *See, e.g.*, Am. Compl., ¶9 ("State public officials made the decision to replace safe water with a toxic alternative. . ."); *see also* Am. Compl., ¶¶5, 8, 36, 53, 59, 64, 93, 104, 106, 113, 114, 117-18, 119, 142-43, 150, 154.

Under the federal Safe Drinking Water Act, the Environmental Protection Agency is granted broad authority to take actions it deems necessary to protect the public from unsafe water. *See* 42 USC §300i.[7] In addition, a citizen-suit provision allows private citizens to bring civil actions in order to remedy violations of the federal Safe Drinking Water Act or the regulations promulgated under that Act. *See* 42 USC 300j-8. The Michigan Safe Drinking Water Act, while lacking a citizen-suit provision, provides for extensive regulation by the Michigan Department of Environmental Quality[8] and both criminal and civil enforcement actions by the Attorney General.

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[7] For example, the EPA has promulgated regulations under the federal SDWA regarding:

- Maximum contaminant levels, 40 CFR 141.11 *et seq.*;
- Monitoring and analytical requirements, 40 CFR 141.21 *et seq.*;
- Reporting and recordkeeping, 40 CFR 141.31 *et seq.*;
- National Revised Primary Drinking Water Regulations, 40 CFR 141.60 *et seq.*;
- Filtration and disinfection, 40 CFR 141.70 *et seq.*;
- Control of lead and copper, 40 CFR 141.80 *et seq.*; and
- Public notification of drinking water violations, 40 CFR 141.201 *et seq.*

[8] Similarly, the MDEQ has promulgated rules under the MSDWA regarding:

- Public notification and education requirements, Mich. Admin. Code R. 325.10401 *et seq.*;
- Treatment techniques for lead and copper, Mich. Admin. Code R. 325.10604f.;
- Filtration, disinfection, and enhanced treatments, Mich. Admin. Code. R. 325.10611 *et seq.*;
- Coliform sampling, collection, analysis, and monitoring, Mich. Admin. Code R. 325.10704 *et seq.*;

*See* MCL §325.1021; MCL §325.1022.[9] Both Acts therefore provide a remedy to protect against the damagers of unsafe drinking water.

The Court of Appeals thus erred when it found that there were no available remedies and concluded that a constitutional tort remedy was appropriate. Plaintiffs have remedies available, even if the specific remedy of damages is not. The *Jones* Court directed that *available* alternative remedies bar constitutional tort claims. The remedies available under the SDWA and MSDWA should thus bar Plaintiffs from bringing such claims. The Court of Appeals failure to acknowledge these available remedies and their import is another error warranting leave to appeal and reversal.

b. ***A damages remedy is also inappropriate here because "other factors" militate against the creation of a judicially imposed damages remedy in this situation***

Furthermore, Justice Boyle's analysis, approved by this Court in *Jones*, provides additional reasons why a damages remedy is inappropriate here and reveals how the Court of Appeals erred. *See Jones*, 462 Mich at 336 (*referring to Smith*, 428 Mich at 638 (Boyle, J., concurring in part)). As previously shown, Justice Boyle set forth a three-part test: (1) establish the constitutional violations; (2) consider the text, history, and previous interpretations of the provision to determine if a judicially inferred damages remedy is appropriate,; and (3) consider other factors that may

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- Monitoring requirements for lead in tap water, Mich. Admin. Code R. 325.10710a;
- Monitoring requirements for supplies exceeding lead action levels, Mich. Admin. Code R. 325.10710b;
- Reporting requirements for lead corrosion control, Mich. Admin. Code R. 325.10710d;
- Vigilance of threats or hazards, Mich. Admin. Code R. 325.10735;
- Regulating treatment systems and pumping facilities, Mich. Admin. Code R. 325.11001 *et seq*.; and
- Regulating distribution systems, Mich. Admin. Code R. 325.11101 *et seq*.

[9] Plaintiffs even acknowledge this authority vested in the Attorney General, and the exercise thereof, in their own allegations. *See* Am. Compl. ¶114 ("On April 20, 2016, Attorney General Bill Schuette filed … charges for violation of the Michigan Safe Water Drinking (sic) Act.").

militate against a judicially inferred damages remedy. *Smith*, 428 Mich at 648-52 (Boyle, J., concurring in part).

Here, Plaintiffs have failed to allege a violation of the substantive due process bodily integrity right, as previously shown, and a constitutional tort remedy is thus inappropriate. *See supra* subsection III.C.1, at 16. However, even if the underlying constitutional violation and the general appropriateness of a judicially-inferred damages remedy for that underlying constitutional violation is assumed *arguendo*, other factors exist here which militate against a judicially inferred damages remedy under these circumstances.

To determine whether a constitutional tort under the Michigan constitution was appropriate, the *Jones* Court looked to the analysis used by the Supreme Court of the United States in *Bivens v Six Unknown Named Federal Narcotics Bureau Agents*, 403 US 388 (1971),[10] to determine whether a judicially-crafted remedy for a federal constitutional violation was appropriate. *Jones*, 462 Mich at 336 (*citing Bivens*, 403 US at 407). The *Jones* Court then applied the same analysis to determine "whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted." *Id.* The *Jones Court* also noted that "where a statute provides a remedy, the stark picture of a constitutional provision violated without remedy is not presented." *Id.* at 336-37. Looking again to *Bivens*, the *Jones* Court instructed that that "the existence of a legislative scheme may constitute 'special factors counselling hesitation,' which militate against a judicially inferred damages remedy." *Id.* at 337 (*citing Bivens*, 403 US at 396). Such a scheme, as previously shown, exists here. *See supra* subsection III.C.1.a, at 23

[10] *Bivens* recognized that a private remedy was sometimes available for violations of the federal constitution.

Justice Boyle, in her *Smith* concurrence, also looked to the Supreme Court's treatment of *Bivens* claims for guidance. *Smith*, 428 Mich at 647-48. She identified two situations in which *Bivens* actions were barred, and one in which it was not. *Smith*, 428 Mich at 647-48. Specifically, Justice Boyle noted that while *Bivens* actions are not barred by the federal tort claims remedy, *id.* at 647 (*citing Carlson v Green*, 446 US 14 (1980)), *Bivens* actions were barred by comprehensive federal civil service statutes, which expressed clear public policy decisions regarding federal employment, and the unique requirements of military life and Congress's constitutional authority over the military. *Id.* at 647-48 (*citing Bush v Lucas*, 462 US 367 (1983) and *Chappel v Wallace*, 462 US 296, 304 (1983)). Examining these decisions provides additional insight into why a damages remedy is inappropriate here.

In *Carlson*, the Supreme Court of the United States, in analyzing whether the Federal Tort Claims Act (FTCA) barred a *Bivens* action, concluded that: (1) judicially crafted remedies against the defendants were not constitutionally inappropriate, (2) qualified immunity was available to to minimize the burden on the government defendants, and (3) congressional comments to the 1974 amendments to the FTCA made it clear that Congress viewed the FTCA and *Bivens* actions as parallel and complementary. *Carlson*, 446 US at 19-20. In addition, the *Carlson* Court also noted that a *Bivens* action, (4) has a greater deterrent effect because it was recoverable against individuals, (5) allows for punitive damages, (6) allows for a jury trial, and (7) allows for uniformity not possible under the FTCA. *Id.* at 20-23.

An analysis of the factors that justified recognition of a damages remedy in *Carlson* reveals that most of those factors are *not* present here. As a general matter, judicially-crafted remedies are not constitutionally inappropriate, which would weigh in favor of the Plaintiffs. However, this Court's decisions make it clear that immunity is not available as a defense, which weighs against recognizing a damages remedy here. *See Jones*, 462 Mich at 336. Similarly, where a *Bivens*

actions imposes liability against individual federal officials, Michigan constitutional tort claims may only be brought against the State (or its officers in their official capacities), and the deterrent effect of such suits will therefore be low, because the State officials will not be personally liable.

In addition, while *Bivens* actions include the possibility of punitive damages, such damages are unavailable under Michigan law. *Bivens* actions in federal court also come with a jury trial right that is absent in the Court of Claims. Finally, the federal need for uniformity among differing circuits does not exist in Michigan, where a single court of justice addresses any such concerns. Thus, the majority of the *Carlson* factors weigh against the creation of a damages remedy. The Court of Appeals failed to conduct this analysis, and its conclusion that a damages remedy is appropriate here is thus in error.

Furthermore, the *Bush* and *Chappel* decision by the Supreme Court of United States, addressing the propriety (or lack thereof) of *Bivens* actions that fall within the scope of other federal statutes and regulations, reveal additional reasons why a damages remedy is not warranted here. The *Bush* Court noted that "[t]he question is not what remedy the court should provide for a wrong that would otherwise go unredressed. It is whether an ***elaborate remedial system that has been constructed step by step, with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue***." *Bush*, 462 US at 388 (emphasis added). The *Bush* Court then held that the complex rules and regulations governing federal employees, established pursuant to federal law, made *Bivens* actions for situations within the scope of those regulations inappropriate.

Similarly, the *Chappel* Court determined that "the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." *Chappell*, 462 US at 304. Thus, in addition to supporting the holding in

*Bush* that complex and comprehensive statutes and regulations justifyies denial of *Bivens* remedy, *Chappel* also stands for the proposition that a *Bivens*-style damages remedy can be inappropriate *despite* the lack of an available damages remedy. *Id.* As a result, the lack of a damages remedy under the federal or state SDWAs is without import.

*Bush*, and *Chappel* stand for the principle that a comprehensive statutory or regulatory scheme constitutes a "special factor" weighing against the availability of judicially-created damages remedies. Here, where the underlying claims are inextricably entwined with the state and federal SDWAs, that special factor is implicated. The lack of a damages remedy under those statutes represents a deliberate policy choice by the legislature and by Congress, to which the Court of Appeals failed to give proper deference too. Judicial creation of a damages remedy is thus inappropriate here.

In *Jones* and *Smith*, this Court used *Bush*, *Chappel*, and *Carlson* to identify two different methods by which courts can analyze whether a damages remedy for a constitutional tort is warranted. Under either test, a damages remedy for constitutional torts is inappropriate in this case. The Court of Appeals failed to conduct either analysis appropriately, and the Court of Appeals so erred. In addition, the Court of Appeals also erred by failing to give appropriate weight to the existence of other remedies, despite this Court's instructions to the contrary. There has never been a case in which this Court has held that a constitutional tort for damages was appropriate, and this case should not be the first. Leave to appeal or reversal of the lower courts is thus warranted on this issue.

## D. THE COURT OF APPEALS ERRED BY RECOGNIZING AN INVERSE CONDEMNATION CLAIM

**STANDARD OF REVIEW**: This court reviews the Court of Appeals' denial of Defendant-Appellants' motion for summary disposition review regarding this issue *de novo*. *Rowland*, 477 Mich at 202.

In order to establish a *de facto* taking—necessary to support Plaintiff-Appellees' claim here—there must be action by the government, directly aimed toward the plaintiffs' property, that has the effect of limiting the use of the property or causing a decline in property value. *Blue Harvest, Inc v DOT*, 288 Mich App 267, 277 (2010). "Under Michigan law, a "taking" for purposes of inverse condemnation means that governmental action has permanently deprived the property owner of any possession or use of the property." *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 89 (1989). And when considering whether a *de facto* taking has occurred, the Court "must consider 'the form, intensity, and the deliberateness of the government actions' in the aggregate." *Dorman v Twp. of Clinton*, 269 Mich App 638, 645 (2006).

In addition, a plaintiff must allege that the property was directly affected in a manner distinct from that of other similarly situated persons. *See Spiek v DOT*, 456 Mich 331, 346 (1998). Under Michigan law, "[t]he right to just compensation, in the context of an inverse condemnation suit for diminution in value caused by the alleged harmful affects (sic) to property abutting a public highway, exists only where the land owner can allege a unique or special injury, that is, an injury ***that is different in kind, not simply in degree, from the harm suffered by all persons similarly situated***." *Id.* at 348 (emphasis added). This requirement applies when "a legalized nuisance affects all in its vicinity in common." *Id.* at 345. Although *Spiek* addresses the application of the legalized nuisance doctrine to public highways, it should be equally applicable here, where a public water distribution system serving a major municipality is implicated.

In *Murphy v City of Detroit*, involving an arguably more drastic and direct allegation of inverse condemnation, the plaintiffs attempted to invoke inverse condemnation due to the diminished property value of their businesses resulting from the removal of the entirety of the surrounding neighborhoods and the consequential loss of customers. *Murphy v City of Detroit*, 201

Mich App 54, 55 (1993). Despite this measurable and significant loss of value, the Court of Appeals explained that while the defendants' actions undoubtedly *affected* the plaintiffs' property, they did not take "deliberate action directed toward plaintiffs' property rights that deprived plaintiffs of possession or use of their land or buildings." *Id.* at 57. Similarly, while the change in water supply may have affected the Plaintiff-Appellees' property, that does not equate to a deliberate action directed towards the Plaintiff-Appellees' property rights.

The Court of Appeals distinguished this case from *Murphy*, reasoning that "plaintiffs allege deliberate actions taken by defendants that directly led to toxic water being delivered through Flint's own water delivery system directly into plaintiffs' water heaters, bathtubs, sinks, and drinking glasses, causing actual, physical damage to plaintiffs' property and affecting plaintiffs' property rights." Opinion, at 36. This reasoning, however, is in error. The situation in *Murphy* could be similarly summarized by saying that "the City of Detroit acted in a manner that directly led to the measurable and significant loss of value of the Plaintiffs' property through the destruction of surrounding neighborhoods." The correct question is thus not whether the defendants' actions "directly led" to the damaging results, but whether the Defendants took "affirmative actions directly aimed at the plaintiff's property." *In re Va. Park*, 121 Mich App 153, 161 (1982).

Here, the affirmative actions were not directly aimed at the plaintiffs' property. Instead, they were aimed at the City's own treatment processes. There was no intent or aim at having any effect on the property rights of the plaintiffs. As a result, while the change in water supply may have affected the Plaintiff's property, that decision was not *aimed at* the plaintiff's property, and therefore the Plaintiffs failed to allege an inverse condemnation claim. The Court of Appeals erred by reaching a different result.

In addition, the Court of Appeals erred by holding that *Spiek's* "public nuisance" exclusion did not apply. In *Spiek v DOT*, 456 Mich 331 (1998), this Court directed that "[t]he right to just compensation, in the context of an inverse condemnation suit for diminution in value caused by the alleged harmful affects (sic) to property abutting a public highway, exists only where the land owner can allege a unique or special injury, that is, an injury that is different in kind, not simply in degree, from the harm suffered **by all persons similarly situated**." *Spiek*, 456 Mich at 348 (emphasis added). The Court of Appeals held that it was correct for Plaintiffs, who, in essence, constitute the entire population of the City of Flint, to compare themselves to all water users in the State of Michigan, in order to establish that they suffered a unique or special injury.

However, the Court of Appeals failed to incorporate other guidance from *Spiek*, where this Court further explained that "[w]here harm is shared in common by many members of the public, the appropriate remedy lies with the legislative branch and the regulatory bodies created thereby, which participate extensively in the regulation of vibrations, pollution, noise, etc., associated with the operation of motor vehicles on public highways." *Id.* at 349. In *Spiek*, this Court thus made it clear that the public nuisance exception to inverse condemnation claims is, in essence, judicial deferral to the "legislative branch and the regulatory bodies created thereby" which balance numerous public policy consideration in the regulation and direction of such activities which affect the general public. Specifically, as previously shown, the state and federal SDWAs provide the remedies deemed appropriate by the state legislature and Congress, and a judicial remedy for inverse condemnation would thus be inappropriate.

In summary, the Court of Appeals erred by allowing Plaintiffs' inverse condemnation claim to survive. Plaintiffs have failed to allege that they suffered from affirmative actions that were directly aimed at their property. Plaintiffs' inverse condemnation claim also seeks damages as a remedy for a public nuisance, for which judicial deference to the Legislature and its legislatively-

created regulatory bodies is called for. Reversal of the lower courts and leave to appeal on this issue is thus warranted.

## IV. CONCLUSION AND RELIEF REQUESTED

For the reasons stated, the Darnell Earley and Gerald Ambrose, former Emergency Managers for the City of Flint, respectfully request that this court grant leave to appeal on all issues set forth in this brief, or, in the alternative, that that this Court issue an order reversing the Court of Appeals as to the issues raised here and directing entry of summary disposition as to the former Emergency Managers.

Respectfully submitted,

Dated: March 8, 2018

***/s/ William Y. Kim***

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**IN THE SUPREME COURT**
**FOR THE STATE OF MICHIGAN**

MELISSA MAYS, et al.,
Plaintiff-Appellees,

v

DARNELL EARLEY and GERALD AMBROSE,
Defendant-Appellants,

and

GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and MICHGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES
Defendants.
_____/

Supreme Court No. _____

Court of Appeals Nos. 335555, 335725, 335726

Court of Claims No. 16-17-MM

**PROOF OF SERVICE**

The undersigned certifies that on March 8, 2018, I directed that a copy of the City of Flint's Application for Leave to Appeal to be served upon the attorneys of record in the above cause by filing them with the TrueFiling system, which will serve copies on all attorneys of record who appeared below.

Respectfully submitted,

Dated: March 8, 2018

***/s/ William Y. Kim***_____
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